

NO. 21781 ✓

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JEWELL JAMES WILLIAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.  
United States Attorney

JOHN A. MITCHELL  
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Attorneys for Appellee,  
United States of America.

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STATUTES

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APPELLEE'S BRIEF

I

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION

The appellant contends that this Court has jurisdiction in this case pursuant to Title 18, United States Code, Section 4042 and Title 28, United States Code, Sections 1291, 1331 and 1346 (b). [A.B. pp. 1-2]<sup>1/</sup>

The United States of America contends that this Court does not have jurisdiction in this case in that this matter has previously been before this Court and a decision rendered adverse to the appellant. [See Appendixes "A" and "B".]. This contention will be developed more completely in the argument section of this brief.

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<sup>1/</sup>

"A.B" refers to Appellant's Brief.



STATUTES INVOLVED

Title 18, United States Code, Section 4042, reads in pertinent part, as follows:

"The Bureau of Prisons, under the direction of the Attorney General, shall --

"(1) have charge of the management and regulation of all Federal penal and correctional institutions;

"(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

"(3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.

"This section shall not apply to military or naval penal or correctional institutions or the persons confined therein."

Title 28, United States Code, Section 1291, reads in pertinent part as follows:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."





Title 28, United States Code, Section 1331, reads in pertinent part, as follows:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

Title 28, United States Code, Section 1346 (b), reads in pertinent part, as follows:

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful



act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Title 28, United States Code, Section 2671, reads in pertinent part, as follows:

"As used in this chapter and sections 1346(b) and 2401(b) of this title, the term --

"'Federal agency' includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty."

Title 28, United States Code, Section 2680, reads in pertinent part, as follows:



"(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

### III

#### STATEMENT OF THE CASE

##### A. Questions Presented

1. Does this Court have jurisdiction over this appeal?
2. Can the United States District Court, on its own Motion, dismiss a civil action?
3. Is the appellant barred by the doctrine of sovereign immunity from suing the United States?
4. Is the Honorable James M. Carter, and thus the United States, immune from a civil lawsuit in this case?
5. Is the United States responsible for the criminal acts of a third party?
6. Is the United States responsible for the negligence of an independent contractor?

##### B. Statement of the Facts

On July 26, 1963, the appellant was indicted for aiding and abetting the robbery of a bank in San Diego, California. He was convicted by a jury and subsequently a new trial was granted by the Honorable James M. Carter. A superseding indictment was filed on March 18, 1964, charging



the appellant with receiving stolen bank robbery money. He was again convicted by a jury and sentenced to a four year period of incarceration pursuant to Title 18, United States Code, Section 4208(a). An appeal was taken and his conviction was affirmed. Williams v. United States (9th Cir. 1966) 358 F.2d 325. [C.T. 250] <sup>2/</sup>

On February 10, 1965, the appellant filed a 248 page document in the United States District Court for the Southern District of California. The document in addition to alleging that the conviction was improper alleged in substance that (1) the Honorable James M. Carter stated in open court and told a prisoner at the San Diego County jail that the appellant had committed incest; and (2) a fellow prisoner, because of the statements made by the Honorable James M. Carter, cut the appellant's eyes. It may be possible to interpret the 248 page document as also alleging that the United States did not adequately protect the appellant. [C.T. 2-251].

The 248 page document was filed by the Honorable Fred Kunzel, who presided at the second jury trial, as a petition under Title 28, United States Code, Section 2255 [3240-SD-K], and as a civil action against the United States purporting to come within Title 28, United States Code, Section 1346(b) [3241-SD-K]. [C.T.250].

The Honorable Fred Kunzel dismissed the 2255 motion; and also the tort claims action because even if the allegations of the Complaint are taken as true the alleged negligent act of the Honorable James M. Carter was not

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<sup>2/</sup>  
"C.T." refers to the Clerk's Transcript.





the proximate cause of the injury to the appellant. The proximate cause of injury was the criminal conduct of appellant's fellow prisoners. [C.T.251].

The Honorable Fred Kunzel also took judicial notice of the contract between the local government and the United States for the lodging of federal prisoners. Based upon the contract and the Complaint the Court held that the United States was not liable for the negligence of an independent contractor. [C.T.251-252].

The appellant on February 25, 1965, filed a Notice of Appeal from the Order dismissing the 2255 motion [3240-SD-K] and the tort claims action [3241-SD-K]. [C.T.253].

On December 1, 1965, pursuant to motion of the United States, this Court in number 20,329 dismissed the appeals in 3240-SD-K and 3241-SD-K. [Appendixes "A" and "B"]

The appellant now presents for this Court's consideration the propriety of the dismissal by the Honorable Fred Kunzel of 3241-SD-K. ["A.B" 3-23].

#### IV

#### SUMMARY OF ARGUMENT

This Court does not have jurisdiction over this appeal, in that this case has previously been before the Ninth Circuit Court of Appeals and has been dismissed.

The United States District Court on its own motion can dismiss a civil action.

The appellant is barred by the doctrine of sovereign immunity from



suing the United States, in that assault and battery and defamation have been specifically excepted from the Federal Tort Claims Act. Further, the acts of the judiciary are not covered by the Federal Tort Claims Act.

The Honorable James M. Carter and, thus the United States, is immune from a lawsuit in this case.

The United States is not responsible for the criminal acts of a third party in that the alleged cutting of the appellant's eyes was not foreseeable.

The United States is not responsible for the negligence of an independent contractor.

## V

### ARGUMENT

#### A. THIS COURT DOES NOT HAVE JURISDICTION OVER THIS APPEAL .

The 248 page document was filed by the Honorable Fred Kunzel as an action purporting to come within Title 28, United States Code, Section 1346(b), more commonly called the Federal Tort Claims Act. The case was dismissed in February of 1965 and the appellant filed a Notice of Appeal. In December of 1965, as indicated by Appendixes "A" and "B", the appeal was dismissed by this Court. Now approximately 18 months after this Court's dismissal of the appellant's appeal from Judge Kunzel's dismissal of the tort action the appellant is attempting to relitigate matters previously



considered by this Court.

It is fundamental that if this Court has previously considered this case and rendered a decision adverse to the appellant this appeal is barred.

If for some reason this Court's prior decision in 20,329 is not sufficiently clear it is suggested that the panel previously considering this matter determine whether or not it was their intention that 3241-SD-K be dismissed as indicated by Appendixes "A" and "B".

If 3241-SD-K was intended to have been dismissed, then of course this appeal is barred as this Court has previously considered this matter.

However, if this Court did not intend to dismiss 3241-SD-K then the merits of the dismissal by the Honorable Fred Kunzel must be considered.

B. THE UNITED STATES DISTRICT COURT, ON ITS OWN MOTION,  
CAN DISMISS A CIVIL ACTION.

In this case the 248 page Complaint was filed in 3241-SD-K by the Honorable Fred Kunzel as a tort action under Title 28, United States Code, Section 1346(b) and then dismissed. The appellant contends that the dismissal was in error. ["A.B." 7-12].

The appellant relies on dictum in the case of Gutensohn v. Kansas City Southern Ry. Co. (8th Cir. 1944) 140 F.2d 950, for the contentions previously

Though the order of dismissal is not entirely clear it appears that both 3240-SD-K and 3241-SD-K were included in the Order on Motion dismissing those cases. See: Appendixes "A" and "B".



mentioned. In our case the appellant was incarcerated in a federal penitentiary located in another state and thus could not have been present for a hearing on his tort claims action.

Finally, and most important, our case involves a frivolous Complaint relating to illegal activity of the Honorable James M. Carter which allegedly resulted in the appellant's eyes being cut while awaiting a ruling on a Motion for New Trial.

In the case of Safeway Stores v. Fannan (9th Cir. 1962) 308 F.2d 94, this Court considered an analogous problem and it was concluded that the Trial Court does have the power on its own motion to dismiss a civil action.<sup>4/</sup>

It is respectfully submitted, within the doctrine of the Safeway Stores case, supra, that the trial Court did not commit plain error in dismissing the Complaint.<sup>5/</sup>

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<sup>4/</sup> See also: Hoe v. Wilson (1869) 76 U.S. 501; Hicks v. Bekins (9th Cir. 1940) 115 F.2d 406; Carnegie Bank v. City (9th Cir. 1940) 110 F.2d 569; Shotkin v. Westinghouse (10th Cir. 1948) 169 F.2d 825; Darlington v. Studebaker (7th Cir. 1959) 261 F.2d 903; Knights of Klu Klux Klan v. Monmouth Pleasure Club (3rd Cir. 1929) 34 F.2d 730; Pierce v. Submarine Signal Company (D.C. Mass 1939) 25 F. Supp. 862; and Fougers v. Jones (Cir. Ct. Ind. 1895) 66 F. 316.

<sup>5/</sup> Of course amendment to a Complaint should be allowed when justice requires it; however in this case the Complaint is on its face frivolous.





C. THE APPELLANT IS BARRED BY THE DOCTRINE OF SOVEREIGN  
IMMUNITY FROM SUING THE UNITED STATES.

The 248 page Complaint filed by the appellant alleges in substance that the Honorable James M. Carter as a result of comments made in Court and in an interview with a federal prisoner caused the appellant's eyes to be cut.

Has the United States, if we assume that the allegations of the Complaint are true, consented to be sued under the Federal Tort Claims Act?

Under the doctrine of sovereign immunity no action will lie against the United States unless Congress has authorized it. Reid v. United States (1909) 211 U.S. 529; Munro v. United States (1938) 303 U.S. 36; United States v. Sherwood (1941) 312 U.S. 584; and Dalehite v. United States (1952) 346 U. S. 15.

The Congress of the United States in the Federal Tort Claims Act has specifically excepted assault and battery.<sup>6/</sup> If the Complaint is based upon a battery then the doctrine of sovereign immunity applies and the United States has not consented to be sued.

It may be argued that the Complaint alleges a cause of action for defamation but again Congress has specifically excepted defamation from the Federal Tort Claims Act.<sup>7/</sup>

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<sup>6/</sup>

See: 28 U.S.C. 2680(h).

<sup>7/</sup>

See: 28 U.S.C. 2680(h)



Notwithstanding the foregoing analysis relating to assault and battery and defamation it is clear that the acts of judiciary are not covered by the Federal Tort Claims Act.

Title 28, United States Code, Section 2671, limits the definition of a "Federal agency" to the executive branch of government and excludes the judicial branch of government. The Government's control or right to control is the touchstone of the type of respondent superior liability intended in the Federal Tort Claims Act. It is hard to conceive of persons more free and independent from control than judges of the Federal Courts. Congress did not intend that the actions of the judiciary be covered.

Authority for the foregoing proposition is found in Cromelin v. United States (5th Cir. 1949) 177 F.2d 275, where it was stated that:

"Such officers [Federal judges] are not within the contemplation of the Tort Claims Act." p. 277

If we take the allegations of the Complaint as true, the alleged action of the Honorable James M. Carter, which allegedly led to the cutting of the appellant's eyes by a fellow prisoner, is excepted from the provisions of the Federal Tort Claims Act.

D. THE HONORABLE JAMES M. CARTER, AND THUS THE UNITED STATES, IS IMMUNE FROM A CIVIL LAWSUIT IN THIS CASE.

If the allegations of the Complaint are accepted as true then the Honorable James M. Carter allegedly mentioned in Court and while interviewing a prisoner in the San Diego County jail that the appellant had been



charged with incest. The comment in Court and to the prisoner allegedly took place following the first conviction of the appellant and while the Honorable James M. Carter was considering whether or not a Motion for New Trial, which was subsequently granted, should be granted. The comment in Court and the statement while interviewing a prisoner were within his judicial function.

It is hornbook law that a judge is immune for his actions performed within his judicial function. 48, C.J.S., Judges, Section 63, et. seq.

Under Title 28, United States Code, Section 1346(b) the United States is only liable if the private person, in this case the Honorable James M. Carter, could be held liable by the appellant under California law.

Under California law the Honorable James M. Carter is immune from a civil action in this case. Turpen v. Booth (1880) 56 Cal. 65; Haase v. Gibson (1960) 179 C.A. 2d 256; Reverend Mother Pauline v. Bray (1959) 168 C.A. 2d 384; and Singer v. Bogen (1957) 147 C.A. 2d 515.

It is respectfully submitted that if the Honorable James M. Carter is immune from a civil action under California law then the United States has not consented to be sued under the Federal Tort Claims Act.

#### E. THE UNITED STATES IS NOT RESPONSIBLE FOR THE CRIMINAL ACTS OF A THIRD PARTY.

If the allegations of the Complaint are accepted as true then this Court is faced with the determination as to whether or not the cutting of the appellant's eyes by a fellow prisoner caused by a statement of the



Honorable James M. Carter concerning an alleged incestuous relationship of the appellant made in open court and when interviewing a prisoner sets forth a valid cause of action? More simply stated, is the United States responsible for the criminal acts of a third party?

It is stated in 38 Am. Jur., Negligence, Section 71 that:

"Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts . . . .

Therefore, as the facts are ordinarily against a defendant presented, no recovery can be allowed for an injury which resulted from the criminal act of a third person, although there existed at the time a condition which made that act possible or less difficult to accomplish, and which was produced by the negligence of the defendant."

In the case of Walsh v. Hunt (1898) 120 Cal.46, the Supreme Court of California, in a decision which has not been overruled, stated that:

"[W]here it is through the instrumentality of a criminal act that the wrong is accomplished, it is the crime, and not the negligent act which is the proximate cause of the injury . . ." p. 49.

The decisions cited by counsel for the appellant do not disagree with the proposition presented but rather present fact situations where in this state the criminal act of a third party was held to be foreseeable.





As stated in Barclay Kitchen, Inc. v. California Bank (1962) 208 C.A. 2d 347,

"While intervening criminal acts in some cases may supersede the defendant's negligence, the test is whether the actor should have realized at the time of his negligent conduct that there was a likelihood that as a result thereof a third person might commit an intentional tort or crime . . . ." p. 355.

In our case it is difficult if not impossible to see how the Honorable James M. Carter could have foreseen that a statement allegedly made in Court, and when interviewing a prisoner, could lead to a prisoner allegedly cutting the appellant's eyes with a razor blade.

If however, the cutting of the appellant's eyes as alleged in the Complaint was foreseeable then the action is still barred by the doctrine of sovereign immunity and the immunity of the Judge for his judicial acts.

F. THE UNITED STATES IS NOT RESPONSIBLE FOR THE NEGLIGENCE OF AN INDEPENDENT CONTRACTOR.

The United States does not admit that the Complaint in any way alleges tortious conduct of the employees of the San Diego County jail. Rather, the Complaint relates to the alleged tortious conduct of the Honorable James M. Carter.

However, the Honorable Fred Kunzel did take judicial notice of a contract between local and federal governments to lodge prisoners in the San Diego County jail.



For the purpose of this discussion it will be assumed that the Complaint alleges that the injury to the appellant was caused by the negligence of the employees of the San Diego County jail.

The appellant alleges that the United States has a non-discretionary, non-delegable duty to protect prisoners in its custody who are charged with crimes against the United States.

The appellant relies in part upon Title 18, United States Code, Section 4042, which provides in substance that the Bureau of Prisons shall protect all federal prisoners. Without citing authority the appellant alleges that the foregoing section gives rise to a non-delegable duty, and if the appellant's analysis is followed to its logical conclusion, strict liability for the alleged negligence of an independent contractor.<sup>8/</sup>

Appellant next attempts to bring the alleged negligence of the independent contractor within Title 28, United States Code, Section 2671 as an employee of the government. If this analysis is followed to its logical conclusion

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<sup>8/</sup>

In United States v. Muniz (1963) 374 U.S. 150, at pp. 164-165, the Supreme Court of the United States stated that Title 18, United States Code, Section 4042 fixes the degree of care owed by the Bureau of Prisons to a federal prisoner. The Supreme Court did not indicate that strict liability for the alleged negligence of an employee of an independent contractor has been created by this section.



employees of the independent contractor, the San Diego County jail, are employees of the government and thus the Federal Tort Claims Act applies. This analysis begs the specific question of whether or not the United States in this case is responsible for the negligence of an independent contractor.

The case of Martarano v. United States (D.C. Nev. 1964) 231 F. Supp. 805 is distinguishable because the United States under the terms of the agreement involved had direct supervision of the state employee involved. In fact the state employee had actually been loaned to the United States by the state.

In Delgado v. Akins (D.C. Ariz. 1964) 236 F. Supp. 202, the state employee was paid from a federal fund and was subject to specific federal rules and regulations. In fact, the United States as to employees similar to the employee involved in Delgado, supra, had taken the position that they had the power to hire and fire those employees.

The cases of Muniz v. United States (2nd Cir. 1962) 305 F.2d 285, affirmed 374 U.S. 150 and Winston v. United States (2nd Cir. 1962) 305 F.2d 253, affirmed 374 U.S. 150; held that a federal prisoner actually in federal custody may bring a suit against the United States for the negligence of an employee of the United States. Muniz and Winston, supra, are of course distinguishable from our case in that the appellant was in the custody of the San Diego County jail.

The question still remains as to whether or not in this case the United States is responsible for the illegal negligence of an independent contractor?

It is clear from reading Title 28, United States Code, Section 2671,



that the term "Employee of the government" is oriented to the term "Federal agency". Thus, unless the employee is an employee of the Federal agency, he is not an employee of the United States for the purpose of imposing vicarious liability upon the United States.

In defining and illustrating the term "Federal agency", Congress was careful to include Government corporations; however, lest the words "and corporations primarily acting as, instrumentalities or agencies of the United States" be misconstrued, Congress was also careful to distinguish between those corporations which are governmental on the one hand and business corporations on the other, which undertake Government projects from time to time but as "contractors" with the Government. Thus, 28 U.S.C. 2671 expressly recites that the term "corporations" as defined therein "does not include any contractor with the United States."<sup>9/</sup>

The generally applied and well established rule is that the employer of an independent contractor is not liable vicariously for torts of the contractor or his employees. Kirk v. United States (9th Cir. 1959) 270 F.2d 110; Dushon v. United States (9th Cir. 1957) 243 F.2d 451; Dunn v. United States (6th Cir. 1964) 327 F.2d 59; and Dickson v. United States (8th Cir. 1961) 296 F. 2d 556.

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<sup>9/</sup>

See 52 Colum. L. Rev. 433, 435 (1953) where it is suggested that the term "contractor" was meant by Congress to include any person who has a contract with the government. Thus, a contractor need not be a corporation. A contractor may be an individual with no employees of his own. See E.G. Dickson v. United States (8th Cir. 1961) 296 F.2d 556.





As indicated by Kirk and Dushon, supra, the test as to whether or not the United States will be held liable under the Federal Tort Claims Act for the alleged negligence of the employees of the San Diego County jail appears to turn on the degree of control that the United States had over the employees of the San Diego County jail in the performance of their duties.

There is no indication in this Complaint that the United States had any control over the employees of the San Diego County jail in the performance of their duties.

It should be noted that there is no indication in the Complaint that the United States was in any way negligent in the selection of the San Diego County jail as a place of incarceration for federal prisoners in San Diego.

It is respectfully suggested that in this case the United States is in no way responsible for the alleged negligence of the independent contractor.



VI

CONCLUSION

The appellee respectfully submits that this appeal should be dismissed and that this matter has previously been adjudicated by this Court.

If the merits of the dismissal of this case by the Honorable Fred Kunzel are reached it is respectfully submitted that the dismissal should be affirmed by this Court.

Respectfully submitted,

EDWIN L. MILLER, JR.  
United States Attorney,

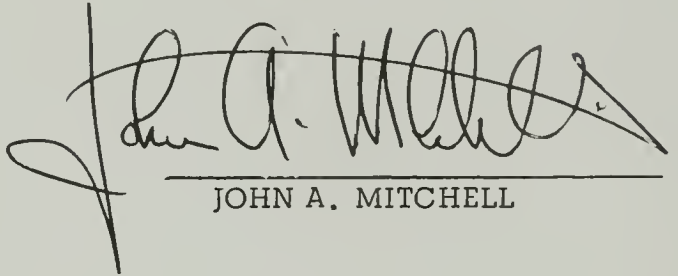
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United States of America.



CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in dark ink, appearing to read "John A. Mitchell", is written over a horizontal line. The signature is stylized with large, flowing loops and a long, sweeping underline that extends to the right.

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JOHN A. MITCHELL